

State of Colorado



Bill Owens
Governor

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Board Director

State Personnel Board
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AGENDA PUBLIC BOARD MEETING August 16, 2005

A public meeting of the State Personnel Board will be held on **Tuesday, August 16, 2005, at Colorado State Personnel Board, 633 17th Street, Suite 1400, Courtroom 1, Denver, Colorado 80202-3604.** The public meeting will commence at 10:30 a.m.

Reasonable accommodation will be provided **upon request** for persons with disabilities. If you are a person with a disability who requires an accommodation to participate in this meeting, please notify Board staff at 303-866-3300 by August 10, 2005.

ANNUAL ELECTION OF BOARD CHAIR AND VICE-CHAIR FOR FISCAL YEAR 2005 – 2006

I. REQUESTS FOR RESIDENCY WAIVERS

- A. August 1, 2005 Report on Residency Waivers

Reports are informational only; no action is required.

II. PENDING MATTERS

- A. Benjamin Vialpando v. Department of Transportation, State Personnel Board case number 2005G002.

Complainant, a certified Inspector I for the Department of Transportation, filed a petition for hearing on July 8, 2004, arguing that he was denied relief in John Muscatell's Step II grievance decision of June 28, 2004, and that the final grievance decision was arbitrary and capricious because Muscatell, Regional Transportation Director and appointing authority for Region 6, failed to address Complainant's allegations of discriminatory actions from his supervisors toward him and the hostile environment which his supervisors have created toward him due to his national origin and ethnic background (Hispanic). He argues that Respondent's actions have resulted in a "tangible loss" of wages from requiring him to work outside the inspector functions and failing to reclassify his position to an appropriate level.

Respondent argues that Complainant failed to meet his burden of showing that valid issues exist that merit a full hearing, CDOT personnel specialists determined that he did not meet the minimum qualifications for the class series which he requested, and his allegations of discrimination are "derived from faulty premises."

On April 8, 2005, a Preliminary Recommendation of the Administrative Law Judge was issued, recommending that a hearing be denied.

On July 18, 2005, Complainant filed a request for Oral Argument; on July 25, 2005, Respondent filed Respondent's Opposition to Complainant's Request for Oral Argument. On July 26, 2005, Complainant filed a letter to the Director re Conflict of Interest.

On July 28, 2005, the Director issued a Notice Regarding Board Consideration of Preliminary Recommendation and Complainant's Motion for Oral Argument, stating that if Complainant's Request for Oral Argument is granted, oral argument will be heard and the Preliminary Recommendation of the Administrative Law Judge will be considered at the September 20, 2005 meeting; if Complainant's Request for Oral Argument is denied, the Preliminary Recommendation of the Administrative Law Judge will be considered at the August 16, 2005 meeting.

**Complainant's Request for Oral Argument and Respondent's Opposition to Complainant's Request for Oral Argument are before the Board for consideration this month; if Complainant's Request for Oral Argument is denied, the Preliminary Recommendation of the Administrative Law Judge will also be considered.

B. Freddie L. Montoya v. Colorado State University at Pueblo, State Personnel Board case number 2005B059.

Complainant, a custodian, appealed his administrative termination, seeking reinstatement, back pay and benefits, and attorney fees. After hearing, the ALJ found that Respondent did not discriminate against Complainant on the basis of disability and that its action was not arbitrary, capricious, or contrary to rule or law. The ALJ concluded Complainant does not have a disability under the Colorado Anti-Discrimination Act, since his limitations do not substantially limit a major life activity. The ALJ further concluded that Complainant is not a "qualified person" under the Act, because he could not perform the essential functions of his position with or without reasonable accommodation. The ALJ also determined that Respondent was diligent in its pursuit of complete information on Complainant's physical limitations, gave appropriate consideration to all information before it, acted reasonably in this situation, provided Complainant with unpaid leave in order to give him extra time to prepare for his return to work, and hired a temporary employee for two months to assist him in performing the essential functions of his position. Thus, Respondent's action was not arbitrary, capricious, or contrary to rule or law, and attorney fees are not warranted.

On April 8, 2005, the Initial Decision of the Administrative Law Judge was issued. Complainant filed his Appeal of the Initial Decision on April 28, 2005, and on August 1, 2005, he filed Complainant's Appeal Brief and Complainant's Request for Oral Argument. On August 3, 2005, Respondent filed its Response to Complainant's Request for Oral Argument. Respondent's Response Brief is due on August 15, 2005.

**Complainant's Request for Oral Argument and Respondent's Response to Complainant's Request for Oral Argument are before the Board for consideration this month. Complainant's appeal of the Initial Decision of the Administrative Law Judge will be before the Board for consideration at the September 20, 2005 meeting.

III. REVIEW OF INITIAL DECISIONS OR OTHER FINAL ORDERS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR ON APPEAL TO THE STATE PERSONNEL BOARD

A. Betty Pinkerton v. Department of Transportation, State Personnel Board case number 2003B115.

Complainant, an administrative assistant, appealed her termination based on failure to perform competently, alleged retaliation for the complaint of sexual harassment she filed against her supervisor one month earlier, and sought reinstatement, back pay, benefits, and attorney fees and costs. Affirming Respondent's actions, the ALJ found that Complainant failed to improve her performance over a period of almost a year by continually exceeding the number of allowable errors within her performance plan; Respondent's action was not arbitrary, capricious, or contrary to rule or law, as Complainant's performance was regularly monitored and reviewed; the discipline imposed was within the range of reasonable alternatives; and attorney fees are not warranted.

On March 9, 2005, the Initial Decision of the Administrative Law Judge was issued. Complainant appealed the Initial Decision of the Administrative Law Judge on April 8, 2005; on June 30, 2005, Respondent filed Respondent's Request that the Board Dismiss Complainant's Appeal and Affirm the Initial Decision of the Administrative Law Judge.

No briefs were filed in the appeal. On July 19, 2005, the Board voted to affirm the Initial Decision of the Administrative Law Judge.

**Respondent's Request that the Board Dismiss Complainant's Appeal and Affirm the Initial Decision of the Administrative Law Judge is before the Board for consideration this month.

B. Randy Pfaff v. Department of Corrections, State Personnel Board case number 2004B112(C).

Complainant, a correctional officer, appealed a corrective action and disciplinary demotion, seeking rescission of both actions, reinstatement, back pay and benefits, and an award of attorney fees and costs. After hearing, the ALJ affirmed the corrective action in a finding that Complainant committed insubordination. With regard to the demotion, the ALJ concluded that Complainant did not commit the acts upon which the discipline was based, that the appointing authority did not attempt to procure evidence he was required to consider prior to imposing discipline, violated the mandates of Board Rule R-6-10 by not meeting with Complainant and his counsel, and failed to obtain and consider mitigating circumstances or information presented by Complainant, in contravention of Board Rule R-6-6. The ALJ ordered that Respondent reinstate Complainant to the rank of Lieutenant retroactive to the date of demotion, provide Complainant with full back pay and benefits to the date of demotion, and pay Complainant's reasonable attorney fees and costs incurred in appealing the demotion.

On February 28, 2005, the Initial Decision of the Administrative Law Judge was issued. Respondent appealed the Initial Decision of the Administrative Law Judge on March 30, 2005. On June 24, 2005, Respondent filed Respondent's Opening Brief on Appeal from the Initial Decision of the Administrative Law Judge.

On July 6, 2005, Complainant filed a Motion to Dismiss or, in the Alternative Motion for Extension of Time; Request for Sanctions. On July 8, 2005, Respondent filed Respondent's Response to Complainant's Motion to Dismiss or, in the Alternative Motion for Extension of Time; Request for Sanctions. Complainant's Answer Brief on Appeal from the Initial Decision of the Administrative Law Judge was filed on July 21, 2005; Respondent's Reply Brief was filed on July 27, 2005.

**Complainant's Motion to Dismiss or, in the Alternative Motion for Extension of Time; Request for Sanctions; Respondent's Response to Complainant's Motion to Dismiss or, in the Alternative Motion for Extension of Time; Request for Sanctions; and

Complainant's Appeal of the Initial Decision of the Administrative Law Judge are before the Board for consideration this month.

IV. REVIEW OF PRELIMINARY RECOMMENDATIONS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR TO GRANT OR DENY PETITIONS FOR HEARING

There are no Preliminary Recommendations of the Administrative Law Judges or the Director to grant or deny petitions for hearing this month.

V. INITIAL DECISIONS OR OTHER FINAL ORDERS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR

- A. Terry Lee Smaaland v. Regents of the University of Colorado, University of Colorado at Colorado Springs, Facilities Services, State Personnel Board case number 2005B107 (July 11, 2005).

Complainant, a grounds supervisor, appealed the five percent reduction in his pay by Respondent, seeking back pay, benefits and attorney fees and costs. After hearing, the ALJ found that Complainant committed the acts for which he was disciplined, including failure to complete the vehicle conversion work assignment and failure to purchase a spray gun. Although the ALJ concluded that Respondent's decision to discipline Complainant was not arbitrary, capricious, or contrary to rule or law, and attorney fees are not warranted, the ALJ also found that the discipline imposed was not within the range of reasonable alternatives as it was a permanent reduction in pay. The ALJ modified the disciplinary pay reduction to a five percent reduction in pay per month for one year.

[The deadline for appealing the Initial Decision of the Administrative Law Judge is August 10, 2005.]

- B. Elaine Lanphier v. Department of Public Health and Environment, Laboratory Radiation Services, State Personnel Board case number 2003B017 (August 1, 2005).

Complainant, an administrative assistant, appealed her administrative termination by Respondent, alleging discrimination based on her disability and seeking reinstatement to a position outside the division or front pay and front benefits, prehearing and post-hearing interest on any award of back pay and benefits, and attorney fees and costs. Respondent requested affirmance of the appointing authority's action and attorney fees and costs. After hearing, the ALJ found that Complainant is a disabled person within the meaning of the ADA, Complainant was otherwise qualified for her position, and Complainant was terminated from her position because of her disability. However, the ALJ found that Complainant did not request reasonable accommodation as she did provide meaningful information regarding her request and, therefore, did not engage in the interactive process; Respondent's action was not arbitrary, capricious, or contrary to rule or law; and attorney fees are not warranted.

[The deadline for appealing the Initial Decision of the Administrative Law Judge is August 31, 2005.]

VI. REVIEW OF THE MINUTES FROM THE JULY 19, 2005 PUBLIC MEETING OF THE STATE PERSONNEL BOARD

VII. ACKNOWLEDGMENTS

DECISIONS OF THE STATE PERSONNEL BOARD MADE AT ITS JULY 19, 2005 PUBLIC MEETING:

- A. David Teigen v. Department of Corrections, Colorado Territorial Correctional Facility, State Personnel Board case number 2003B127.

The Board voted to deny the Petition for Reconsideration of the Board's Decision in Light of Newly Decided Court of Appeals Case.

- B. Gilin S. Jones v. Department of Corrections, Rifle Correctional Facility, State Personnel Board case number 2003B082.

The Board voted to adopt the findings of fact and conclusions of law of the Initial Decision and to adopt the Initial Decision of the Administrative Law Judge.

- C. John L. Deelman v. Department of Education, Colorado School for the Deaf and the Blind, State Personnel Board case number 2005B020.

The Board voted to adopt the Dismissal Order.

- D. Iris Hawkins v. Department of Corrections, Youthful Offender System, State Personnel Board case number 2004B120.

The Board voted to adopt the findings of fact and conclusions of law in the Initial Decision and to adopt the Initial Decision of the Administrative Law Judge.

- E. Pam Cress v. Department of Human Services, Office of Performance Improvement, Employment Affairs Division, State Personnel Board case number 2005B011.

The Board voted to adopt the findings of fact and conclusions of law in the Initial Decision and voted to adopt the Initial Decision of the Administrative Law Judge.

- F. Kristina Lanoue v. Department of Corrections, Limon Correctional Facility, State Personnel Board case number 2005B044.

The Board voted to adopt the findings of fact and conclusions of law in the Initial Decision of the Administrative Law Judge but reversed the Conclusions of Law No. 2-“Complainant is entitled to an award of attorney fees and costs.” The Board reversed this Conclusion of Law on the grounds that based upon the factual findings in this matter, attorney fees are not warranted. The Board further voted to deny the Motion for Contempt Citation due to lack of jurisdiction.

- G. LaVonne Taylor v. Department of Education, Colorado School for the Deaf and the Blind, State Personnel Board case number 2004G029.

The Board voted to adopt the Preliminary Recommendation of the Administrative Law Judge and deny the Petition for Hearing.

VIII. REPORT OF THE STATE PERSONNEL DIRECTOR - Jeff Schutt, Director, Division of Human Resources - Total Compensation Survey

IX. ADMINISTRATIVE MATTERS & COMMENTS

A. ADMINISTRATIVE MATTERS

- End-of-Year 04-05 Budget and Expense Report
- Cases on Appeal to the Board and to Appellate Courts

B. OTHER BOARD BUSINESS

- Results of Election for Board Member
- Judicial Performance Commission
- Staff Activities
- Change of Meeting Location

C. GENERAL COMMENTS FROM ATTORNEYS, EMPLOYEE ORGANIZATIONS, PERSONNEL ADMINISTRATORS, AND THE PUBLIC

X. EXECUTIVE SESSION

- A. Case Status Report
- B. Minutes of the July 19, 2005 Executive Session
- C. Other Business

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NEXT REGULARLY SCHEDULED BOARD MEETINGS - 10:30 a.m.

September 20, 2005	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
October 18, 2005	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
November 15, 2005	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
December 20, 2005	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
January 17, 2006	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
February 21, 2006	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
March 21, 2006	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
April 18, 2006	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
May 16, 2006	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
June 20, 2006	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604